FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

June 30, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 97-49
	:	WEST 97-172
BLACK MESA PIPELINE, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In these civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Black Mesa Pipeline, Inc. ("Black Mesa"), seeks review of Administrative Law Judge Jacqueline Bulluck's determinations that it violated 30 C.F.R. § 77.502, which requires that electrical equipment be frequently examined by a qualified person, and a related record-keeping provision, 30 C.F.R. § 77.800-2, and that the violation of section 77.502 was significant and substantial ("S&S").[1] 20 FMSHRC 666, 672-77, 678-79 (June 1998) (ALJ). The Secretary of Labor seeks review of the judge's determination that the violation of section 77.502 was not attributable to Black Mesa's unwarrantable failure.[2] *Id*. at 677. For the reasons that follow, we reverse the judge's findings of violations.

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

I.

Factual and Procedural Background

Black Mesa's Pipeline Preparation Plant ("prep plant"), located near Kayenta, Arizona, receives coal mined at the nearby Black Mesa Coal Mine, which it crushes into powder, mixes with water, and dispatches as coal slurry for transport by pipeline to an electric power plant 200 miles away. 20 FMSHRC at 667; Tr. 134. Prep plant equipment includes very large pump stations, crushing mills, belts, various motors using between 110 volts and 4160 volts, and other high-voltage equipment such as breakers, control circuits, disconnects, cables, and safety equipment. 20 FMSHRC at 667. Among 36 prep plant employees are seven electricians. *Id.* at 667, 668.

On June 25, 1996, Peter Saint, an electrical inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted his first electrical inspection of the prep plant. *Id.* at 668. Inspector Saint's review of the prep plant's record book of monthly examinations on high-voltage electrical equipment ("high-voltage book") revealed that examinations were being performed by electricians he considered only qualified to work with low and medium-voltage electrical equipment. *Id.*[3] The inspector also observed an electrician working with a high-voltage motor and was told that prep plant electricians handled high-voltage switchgear units. *Id.*

Reviewing the qualifications of prep plant electricians, the inspector discovered that, while all held MSHA cards identifying them as surface low/medium-voltage qualified, none had a card showing qualification to work on high-voltage equipment. *Id.*; Tr. 37, 46-47. From subsequent conversations with electricians and prep plant officials, Saint further learned that, for approximately 18 years, the prep plant's electricians had been performing all electrical work on the property, including high-voltage work. 20 FMSHRC at 668. The electricians and officials also related to the inspector their belief that the electricians were qualified to perform high-voltage work because they had passed five tests given by MSHA and did not work on energized high-voltage circuits or lines. *Id.*

Inspector Saint told the Black Mesa personnel that only electricians MSHA recognized as qualified to work with high voltage are authorized to examine and maintain high-voltage equipment and sign the high-voltage book. *Id.* According to Saint, Black Mesa electricians

[3] MSHA considers voltage of 660 volts and lower "low voltage," voltage between 661 volts and 1000 volts "medium voltage," and voltage above 1000 volts "high voltage." Tr. 29, 286.

lacked high-voltage qualification because MSHA considered them to have passed only four of the five tests administered to electricians seeking qualification by testing. Tr. 147-48.[4]

After two telephone discussions with Donald Gibson, the electrical supervisor for MSHA District 9, Inspector Saint advised Black Mesa that to comply with the agency's testing program, it could either use qualified outside contractors to perform high-voltage work at the prep plant, or qualify its electricians for high-voltage work through MSHA testing. 20 FMSHRC at 668; Tr. 281. The inspector informed Black Mesa officials of several upcoming test dates and said that he would not be returning to the prep plant for approximately 3 months, so as to give the electricians the opportunity to study for and pass the high-voltage test given each month as part of the series of five qualification tests. 20 FMSHRC at 668; Tr. 78-80. Consistent with this grace period, Inspector Saint cited Black Mesa only for violating the record-keeping provision, section 77.800-2, a citation Black Mesa did not contest. 20 FMSHRC at 668; Gov't Ex. 5.

When Saint returned to the prep plant, on September 12, 1996, he was told that none of its electricians were high-voltage qualified under the MSHA testing program. 20 FMSHRC at 668; Tr. 82. Consequently, Saint issued Black Mesa a section 104(a) citation alleging a violation of the regulation which sets forth the electrician qualification process, 30 C.F.R. § 77.103, on the ground that no electrician at the prep plant was certified to perform inspections, maintenance, or repairs on high-voltage equipment. 20 FMSHRC at 669; Gov't Ex.1. In a meeting the following day with Black Mesa officials and a union representative, Inspector Saint learned that Black Mesa intended to seek adjudication of the issue of electrician qualification. 20 FMSHRC at 669.

On Inspector Saint's next visit to the prep plant, on January 9, 1997, he learned that all of the electricians still lacked MSHA high-voltage certification, and that one had been performing monthly high-voltage equipment examinations and signing entries in the record book. *Id.*; Tr. 119-20, 123-24. Consequently, Saint issued a section 104(d)(1) citation alleging an S&S violation of section 77.502 on the ground that monthly inspections and maintenance of high-voltage equipment required by that regulation were not being done by a person qualified to work on high-voltage equipment. 20 FMSHRC at 669-70; Gov't Ex. 2. He also cited Black Mesa again for violating the record-keeping regulation, section 77.800-2. 20 FMSHRC at 670; Gov't Ex. 3. On March 4, 1997, three prep plant electricians passed the MSHA high-voltage examination and became high-voltage qualified. 20 FMSHRC at 670.

When the matter came before Judge Bulluck for hearing, the Secretary argued that bifurcating the testing system between low/medium-voltage qualification and high-voltage

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[4] MSHA witnesses testified that while section 77.103(b)(5) requires the Secretary to test on the "[r]equirements of Subparts F through J and S of . . . Part 77[,]" the requirements of Subpart I - Surface High Voltage Distribution are tested separately. Testimony indicated they are the subject of the fifth test, which is taken by an electrician seeking high-voltage qualification and is only administered to him after he has passed the first four tests and obtained low/medium-voltage qualification. Tr. 140-41, 256-57, 316-17, 321-22.

qualification is a reasonable interpretation of her qualification-by-testing regulation. 20 FMSHRC at 672. The judge subsequently affirmed the January 1997 citations for alleged violations of sections 77.502 and 77.800-2, and in the process upheld the Secretary's interpretation of section 77.103 on which those citations were based. *Id*. at 673-75, 678-79.[5] According to the judge, section 77.103 is ambiguous with respect to the question of whether the Secretary can differentiate between electricians "qualified" to work on low/medium-voltage equipment and those who can work on high-voltage equipment. *Id*. at 673. The judge noted the language of section 77.103 does not distinguish between levels of qualification and found the Secretary's "bifurcated" program of requiring applicants to become low/medium qualified before they can become qualified to do high-voltage work was a reasonable interpretation of the regulation. *Id*. at 673-74. Because she found that high-voltage motors and switchgears were being worked on at the prep plant by electricians not qualified to do so, she affirmed both the citation alleging a violation of section 77.502 (*id*. at 675), and the related record-keeping violation of section 77.800-2, finding that the required monthly inspections entered in the record book were not performed by a high-voltage qualified electrician. *Id*. at 679.

The judge agreed with the Secretary that the violation of section 77.502 was S&S, but rejected the Secretary's charge that the violation was due to Black Mesa's unwarrantable failure. *Id*. at 675-77. The judge decreased the Secretary's proposed penalty from $2,500 to $400 for the section 77.502 violation, on the ground that the Secretary, who had initially assessed the penalty at $150, was impermissibly seeking to punish Black Mesa for not acceding to the Secretary's interpretation of 77.103. *Id*. at 677-78. The judge also assessed a $100 penalty for the section 77.800-2 violation. *Id*. at 679. Black Mesa and the Secretary cross-petitioned for review before the Commission, which granted both petitions.

II.

Disposition

Black Mesa contends that the qualification-by-testing terms of section 77.103 cannot be lawfully interpreted to support the Secretary's bifurcated system of qualification. BM Br. at 11-13. According to Black Mesa, nothing in the relevant regulatory scheme indicates that qualification for high-voltage work is to be separate and apart from low and medium-voltage qualification. *Id*. at 12-13.

The Secretary responds that the judge properly upheld the Secretary's interpretation of section 77.103 as an ambiguous regulation to which deference is owed because the interpretation is a reasonable one. S. Resp. Br. at 5-22. The Secretary maintains that because the regulation does not explicitly designate how qualification for high-voltage work should be tested in relation to qualification for low voltage, the regulation is ambiguous with respect to whether the Secretary

[5] In a ruling that has not been appealed, the judge vacated the September 1996 citation charging Black Mesa with a violation of section 77.103. 20 FMSHRC at 672.

can institute a bifurcated qualification system. *Id*. at 10. The Secretary contends she has adopted qualification levels based on different voltage levels because of the greater degree of danger posed by high-voltage equipment. *Id*. at 19-22.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Section 77.502 states in pertinent part that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions[.]" Section 77.502-1 explains that "[a] qualified person within the meaning of § 77.502 is an individual who meets the requirements of § 77.103." Qualification under section 77.103 can be accomplished in three different ways — by virtue of holding a state qualification, by completing an approved training program, or through testing. Section 77.103 specifies the method of qualification by testing as follows:

> (a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of Subparts F, G, H, I, and J of this Part 77 to perform electrical work (other than work on energized surface high-voltage lines) if:
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> . . . .
>
> (3) He has at least 1 year of [mine industry] experience . . . and he attains a satisfactory grade on each of the series of five written tests approved by the Secretary as prescribed in paragraph (b) of this section.
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> (b) The series of five written tests approved by the Secretary shall include the following categories:
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> (1) Direct current theory and application;
> (2) Alternating current theory and application;

(3) Electric equipment and circuits;
(4) Permissibility of electric equipment; and,
(5) Requirements of Subparts F through J and S of this Part 77.

There is nothing in the language of section 77.103, or in the regulatory scheme of which it is a part, which even hints that the drafters of the regulation left open the question of whether there could be more than one level of electrician qualification. Under the plain language of the regulation, a person is either considered "qualified" for electrical work thereunder or is not.[6] Consequently, we disagree with the judge and the Secretary and find absolutely no ambiguity in the language of the regulations.

The Secretary's enforcement action here is based upon her interpretation of the regulation as permitting a distinction between high and low/medium-voltage qualification. It is undisputed that MSHA recognized Black Mesa prep plant electricians as qualified for electrical work under section 77.103, albeit for low/medium voltage. It is only because MSHA did not recognize them as high-voltage qualified that the Secretary cited Black Mesa. *See* Gov't Ex. 2, at 2 (January 1997 citation issued because "no examinations were done by a person qualified to make High Voltage checks"), 3 (citation terminated the day following its issuance because required checks were "made by a certified person, qualified to make High voltage examination").

We thus have before us an alleged violation of a policy that the Secretary has based entirely upon an ambiguity in section 77.103 that does not exist. Section 77.103 contains no language that distinguishes low/medium-voltage qualification from high-voltage qualification, and the Secretary's bifurcated administration of section 77.103 has no basis in the regulation. Under these circumstances, we cannot affirm the citation and allow MSHA to prosecute an operator for supposedly violating a policy that is at odds with the regulation the policy attempts to implement. Because it is not grounded in the plain language of the pertinent regulations, the citation is invalid and the judge's decision to the contrary must be reversed.

We recognize that the larger implication of our holding today is to invalidate that part of the Secretary's present electrician qualification-by-testing program based upon two distinct levels of qualification. However, our holding is required by the plain meaning of the regulations, and we may not go beyond that plain meaning, regardless of the inconvenience it may work on the parties. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996); *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989).[7]

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[6] A separate regulation, 30 C.F.R. § 77.104, addresses qualification to work on energized high-voltage lines.

[7] The dissent states that we "seem[] to believe" that "[r]ejection of the Secretary's bifurcated testing program . . . nullif[ies] the effect of the existing electrician qualification regulations." Slip op. at 12 n.1. We do not hold any such view. To the contrary, we are upholding the plain meaning of section 77.103(b). It is the Secretary's *policy* implementing the

More importantly, we are not convinced that the Secretary's current practice of bestowing a lesser qualification status on electricians who have not passed the high-voltage qualification test is a reasonable interpretation of the regulation that promotes safety. The Secretary's approach instead appears to have the opposite effect and is entirely inconsistent with the language of the regulation. In fact, application of the Secretary's bifurcated testing system creates various anomalies that we believe have the potential to expose electricians in the mining industry and their fellow miners to extremely hazardous situations.

First, under the Secretary's bifurcated testing policy, those seeking low/medium certification, either underground or surface, are not tested on any regulations pertaining to high voltage, as set forth in Part 75 Subpart I (Underground High Voltage Distribution) or Part 77 Subpart I (Surface High Voltage Distribution). This means that individuals considered by the Secretary to be "qualified" can nevertheless work near high-voltage equipment without ever having to demonstrate any knowledge of the hazards associated with high voltage. A lack of knowledge regarding the hazards of high voltage could expose purportedly qualified "electricians" to extreme hazards of the type that only those conversant with the Secretary's high voltage regulations might appreciate. This is the case, for example, with respect to such an important function as determining whether a high-voltage line has been deenergized. *See* 30 C.F.R. § 77.704-1. It thus makes perfect sense that, contrary to the Secretary's policy, neither section 75.153 nor section 77.103 make any distinction between low/medium-voltage and high-voltage qualifications.

A second inconsistency in the Secretary's testing scheme involves the important area of permissibility. Section 77.103 requires an applicant to attain a satisfactory grade on a series of five written tests. Included in this series of required tests is permissibility of electrical equipment. 30 C.F.R. § 77.103(b)(4). In spite of the clear mandate of section 77.103(b)(4), under the Secretary's bifurcated scheme only individuals seeking *underground* low/medium certification are required to be tested on permissibility. As MSHA witnesses admitted at trial, surface low/medium-voltage qualification is obtained without testing on permissibility. Tr. 263-64, 320, 403, 409-10. In place of a permissibility test, the Secretary has unilaterally implemented testing on the National Electrical Code ("NEC") for individuals seeking the low/medium-voltage surface certification.

The Secretary argues that testing on the NEC is the equivalent of the permissibility testing required by section 77.103(b)(4), and that NEC provisions are better suited to surface electricians because they deal with things such as draw-off tunnels, silos, and preparation plants that are common to surface facilities. S. Resp. Br. at 22 n.11; Tr. 409. At first glance this appears to be a reasonable approach. However, a scheme that tests underground and surface low/medium-voltage applicants differently on the section 77.103(b)(4) requirement leads to troubling results when the Secretary then accords a *common* high-voltage qualification to members of both groups who pass the high-voltage test. According to MSHA, the only prerequisite for taking the

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regulation that we find untenable.

common high-voltage qualification test is to be low/medium qualified either *underground or surface*. Tr. 427-36. Granting electricians a common underground and surface high-voltage qualification premised on low/medium voltage surface *or* low/medium voltage underground qualifications based on different criteria could compromise miner safety for the reasons that follow.

First, under the Secretary's testing scheme, a *surface* low/medium-voltage electrician who has passed the common high-voltage test can work as a high-voltage electrician *underground* without ever being tested on his understanding or knowledge of permissibility. This is particularly significant today because of the industry's trend towards utilizing high-voltage electric power in longwall mining operations. *See* 57 Fed. Reg. 39,036 (1992) (notice of proposed rulemaking on approval requirements for high-voltage electrical equipment operated in longwall face areas of underground mines); 64 Fed. Reg. 72,760 (1999) (limited reopening of record for submission of comments). We find it hard to conceive of a more serious threat to miner health and safety than an MSHA-sanctioned qualification process that allows an electrician to perform high-voltage electrical work on longwall equipment without first demonstrating his understanding of electrical permissibility with respect to either low/medium or high voltage. In addition, the Secretary's bifurcated testing scheme qualifies the underground low/medium-voltage electrician, who has passed the common high voltage test, to work as a high-voltage surface electrician without ever being tested on the NEC regulations. This scenario raises serious questions about the safety of the work performed by these individuals, particularly given MSHA's position that testing on the NEC is more appropriate for electricians working on the surface than is testing on permissibility.

Despite our dissenting colleagues' assertion that the "real-world ramifications" of the majority's approach are "alarming" (slip op. at 13), we are far more concerned about the real world consequences on the health and safety of miners in the industry resulting from the Secretary's bifurcated qualification scheme. In fact, the existing data confirms that the risk of death or injury to miners as the result of electrical problems is not merely a hypothetical concern. Accident data compiled by MSHA from 1980 to 1997 indicate that during that period, there were 106 accidents involving overhead electrical lines alone; 32 of these accidents resulted in fatalities. *Mark the Power Line*, Holmes Safety Ass'n Bull., Mar./Apr. 2000, at 3. Contrary to the suggestion of our dissenting colleagues (slip op. at 13), we do not believe that section 77.103(b) is itself tainted. Rather, it is the policy developed by the Secretary for implementing the testing requirements embodied in section 77.103(b) that in our view creates a situation where, although miners are "qualified" electricians under the Secretary's program, in reality, these miners have not met the plainly stated requirements of the regulation. The Secretary's bifurcated testing policy, which finds no support in the language of the regulation itself, is not entitled to any deference from this Commission. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000) (Department of Labor opinion letter regarding employer's policy on use of compensatory time not entitled to deference).

Our dissenting colleagues state that we are "mistaken in believing that we are limited to resolving whether the Secretary is correct in her theory of the violation." Slip op. at 12 n.1. We

hold no such belief. In fact, we agree in principle with the dissent that there are cases where it would be appropriate to find a violation based on the plain meaning of a standard even if such a rationale was not a part of the Secretary's theory of the violation. In *Bluestone Coal Corp.*, for example, the Commission found a violation based on the plain meaning of a cited standard even though the Secretary argued that the standard was ambiguous and her interpretation of it was due deference. 19 FMSHRC 1025, 1028-29 (June 1997). But in *Bluestone*, a violation of a standard was at issue, not a violation of an interpretive policy as is the case here. In this case, we find that we must nullify the policy on which the Secretary based her enforcement action because the Secretary's administration of the qualification-by-testing terms of section 77.103 is simply untenable. She must replace it with a program that ensures miner safety by comporting with the requirements of the regulation.

Given our reversal of the judge's determination that Black Mesa violated section 77.502, we also reverse her determination that Black Mesa violated the related record-keeping regulation, section 77.800-2.[8] We do not reach the questions whether substantial evidence supports the judge's determinations that the section 77.502 violation was S&S but not unwarrantable. Because our reversal also nullifies the penalty assessed for the violation, there is no need to take up Black Mesa's request that we "address" the judge's finding that the Secretary, by increasing the penalty she assessed for the violation of section 77.103, sought to punish the operator for seeking a Commission interpretation of that regulation. BM Br. at 26-29; BM Reply Br. at 9-11.[9]

[8] Section 77.800-2 provides that "[t]he operator shall maintain a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary." Although Black Mesa may not have directly contested the section 77.800-2 violation in its PDR, we are not precluded from reversing the judge's finding of a violation of this record-keeping requirement since it is a direct and logical outgrowth of our reversal of the finding of a violation of section 77.502.

[9] We simply note that the Commission has already spoken on this question. In *Thunder Basin*, the Commission observed that "litigant[s] should not be exposed to greater punishment for forcefully exercising due process rights." 19 FMSHRC 1495, 1505 (Sept. 1997).

III.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Black Mesa violated sections 77.502 and 77.800-2.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Like our colleagues in the majority, we believe the language of the regulations at issue is plain. We also agree with them that the miners in this case "have not met the plainly stated requirements of the regulation." Slip op. at 8. However, unlike our colleagues, we believe that since Black Mesa failed to comply with the plain language of the standards, the citation charging a violation of section 77.502 should be upheld. Accordingly, we would affirm the judge's finding that this violation occurred (though on different grounds than those on which the judge relied). We would also affirm the judge's finding that the violation was significant and substantial, and reverse her determination that it was not the result of an unwarrantable failure.

We begin with the language of the regulation, which of course is the starting point for its interpretation. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Id.; Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Section 77.502 requires that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." Thus, we must decide whether the electrician who performed the monthly inspections of high-voltage equipment at Black Mesa in late 1996 can be considered a "qualified person" under this standard.

To do so, we look to section 77.103, as section 77.502-1 states that "[a] qualified person within the meaning of § 77.502 is an individual who meets the requirements of § 77.103." Section 77.103 provides three methods of qualifying. The one Black Mesa relies on is a testing program, set forth in section 77.103(b). Thus, for us to answer the question of whether the Black Mesa electrician was a "qualified person," we must ascertain whether he received a satisfactory grade on the tests described in section 77.103(b).

That section provides, in no uncertain terms, that there must be five written tests which "shall include the following categories:

(1) Direct current theory and application;
(2) Alternating current theory and application;
(3) Electric equipment and circuits
(4) Permissibility of electric equipment; and,
(5) Requirements of Subparts F through J and S of this Part 77."

If the electrician did not satisfactorily pass all five of these written tests, which must have included all of the above subjects, he cannot be considered qualified under the regulations. The language could not be clearer. Under the plain terms of this regulation, *all* qualified individuals must pass *all* five written tests. The regulations provide no leeway here — a scheme to differentiate among

types of electricians by permitting some of them to be qualified by passing less than all five of the mandated written tests is simply not contemplated by the wording of this standard.

In this regard, we agree with our colleagues in the majority, who recognize that "[u]nder the plain language of the regulation, a person is either considered 'qualified' for electrical work thereunder or is not." Slip op. at 6. Consequently, we also agree with them that the Secretary's bifurcated testing program is not consistent with the standard, and that the judge erred in finding the regulation to be ambiguous. We part ways with our colleagues, however, when they conclude that the citations in this case should not be affirmed. Slip op. at 6. With all due respect to our colleagues, we find it somewhat difficult to declare the regulation that underlies the Secretary's enforcement action in this case to be unambiguous, acknowledge that the operator did not meet the regulation's requirements, and then refuse to uphold the violation. Our task, after all, is to ascertain whether the citation should be upheld by determining whether, under the plain meaning of the standard, a qualified person performed the inspections at issue.[1]

We answer this question by simply ascertaining whether any Black Mesa electrician passed all five of the tests. The testimony is uncontraverted that at the time the citation issued, none of the prep plant electricians had even taken the fifth and final test, which contains material on the high voltage aspects of Subparts H and I of section 77. Tr. 140-41, 256, 321-22, 412.[2]

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[1] The majority is mistaken in believing that we are limited to resolving whether the Secretary is correct in her theory of the violation. *See BethEnergy Mines, Inc.*, 15 FMSHRC 981, 985 (June 1993) (appellee can urge affirmance (and by implication, Commission can therefore affirm) judge's determination on any ground that does not attack that determination or enlarge rights under that judgment). Rejection of the Secretary's bifurcated testing program does not, as the majority seems to believe, nullify the effect of the existing electrician qualification regulations.

[2] The citation describes the "condition or practice" at issue, as

> [e]lectric equipment was not being frequently examined, tested, and properly maintained by a qualified person to assure safe operation at the Black Mesa pipeline preparation plant. High Voltage (4160 volts) motors and circuit breakers are located within the coal preparation plant. Management has failed to provide a qualified person as defined in part 77.103 subpart I to conduct the required examination.

Gov't Ex. 2, at 1. This clearly tracks the requirement of section 77.103(b)(5) that a "qualified person" pass a test on "[r]equirements of subparts F through J . . . of this Part 77."

Consequently, we would affirm the judge's determination that Black Mesa violated section 77.502.[3]

We are troubled by the practical implications of the majority's decision, which acknowledges that it invalidates the Secretary's current electrician qualification-by-testing program but refuses to uphold a citation based on an operator's failure to meet the requirements set forth in the plain language of section 77.103(b). Slip op. at 6. The real-world ramifications of this approach are alarming. Apparently, the majority will refuse to affirm any citation issued by the Secretary based on a violation of section 77.103(b), because that regulation is tainted by the Secretary's bifurcated qualification-by-testing program. Conceivably, electricians who are deficient not only in the area of permissibility (a concern expressed by the majority) but in all of the subjects currently being tested, could be utilized by operators, as it is now futile for the Secretary to cite operators with unqualified electricians. We do not believe that a moratorium on citations in this area is the most effective way of remedying the situation while still protecting miner safety.

We turn now to the question of whether that violation was significant and substantial. The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made

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[3] Our colleagues in the majority reverse the judge's determination that Black Mesa violated section 77.800-2, the record-keeping regulation. Slip op. at 9. Black Mesa failed to raise this issue in its PDR. BM PDR at 9. Accordingly, it is not properly before us. 29 C.F.R. § 2700.70(d).

assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).[4]

We would affirm the judge's finding that Black Mesa's violation of section 77.502 was S&S, finding its arguments (which focus on the second and third prong of the *Mathies* test) unpersuasive. Substantial evidence in the record supports the judge's determination that

> [b]ased on the cumulative testimony regarding the bridging capabilities and destructive, unforgiving peculiarities of high-voltage electricity, and the potential danger of even the slightest mistake or unclean work-habit, I find that the violation created a discrete safety hazard. Based on the lack of training specific to the intricacies of work on high-voltage equipment, I find that there was a reasonable likelihood of serious injury, including death, to an unqualified electrician serving high-voltage electrical equipment, or to others working around or coming into contact with the equipment.

20 FMSHRC at 676-677.

The inspectors provided forceful testimony about the discrete safety hazard created when unqualified electricians work on high-voltage equipment, with descriptions of hazards caused by electrical shock, Tr. 89, burns, Tr. 108-09, and fire and toxic fumes, Tr. 109. Inspector Saint testified that the possibility of surviving a contact with high voltage "is near none," Tr. 89, noting that "[y]ou don't get a second chance in high voltage." Tr. 96.

Black Mesa contends that the failure of its electricians to be high-voltage qualified under the regulations was not shown to contribute to a discrete safety hazard, because their failure to qualify under MSHA's regulations was not tantamount to being unqualified to work on high-voltage equipment, and their actual work on that equipment was not shown to present a hazard. BM Br. at 23. However, the judge did not merely assume that the prep plant electricians were unqualified based on their failure to complete the high-voltage qualification process. Rather, she found that they lacked "training specific to the intricacies of work on high-voltage electrical

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[4] Black Mesa alleges the S&S allegation to be defective because it was reinstated by Inspector Saint, at the direction of the Secretary's counsel, after having been deleted as the result of a Health and Safety Conference between Black Mesa and a representative of the MSHA District Manager. BM Br. at 25. Regardless of how the S&S allegation was handled internally by the Secretary and MSHA prior to trial, the Secretary, through her representatives, tried the allegation below, and we can see nothing that prevents the Secretary from proceeding with the allegation.

equipment" as well as "current training in high voltage electricity" (20 FMSHRC at 676-77), and substantial evidence supports those conclusions.[5]

First, even qualified electricians must take an annual retraining program, in order to keep current with technological changes. Tr. 100; *see* 30 C.F.R. § 77.103(g).[6] Not being high-voltage qualified, the prep plant electricians did not receive the annual high-voltage retraining. Gov't Ex. 16 (report of prep plant electricians' qualification history).

Moreover, the experience of the prep plant electricians in trying to become high-voltage qualified after the section 77.502 citation was issued provides further evidence that they were in fact unqualified to work on high-voltage equipment at the time of the citation. Only three of the seven prep plant electricians took the high-voltage test, and all three needed to take it twice before receiving a passing grade. Tr. 370-72. Most significantly, one of the three was Castillo, whose checks on the high-voltage equipment led to the citation at issue. Tr. 543-44. In these circumstances we feel that the judge's finding that the electricians' lack of high-voltage qualification contributed to a discrete safety hazard is supported by substantial evidence.

Substantial evidence also supports the judge's finding that there was a reasonable likelihood that the hazard contributed to would result in an injury. Inspectors Saint and Gibson testified that a high-voltage accident could kill or permanently disable an individual. Tr. 130, Tr. 380-81*; see also* Gov't Ex. 8 (accident investigation report of a fatal high-voltage accident).

Black Mesa argues that the lack of a high-voltage equipment accident during the 15 or more years in which the prep plant electricians worked on such equipment without high-voltage qualification under the regulations demonstrated there was no reasonable likelihood that an injury-producing event would result. BM Br. at 24. However, simply because a condition or practice has yet to result in injury does not preclude a finding that the condition or practice constitutes a

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[5] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[6] "An individual qualified in accordance with this section shall, in order to retain qualification, certify annually to the District Manager, that he has satisfactorily completed a coal mine electrical retraining program approved by the Secretary." In fact, electrical supervisor Castillo, who was initially high-voltage qualified by virtue of "grandfathering in" under the regulations, failed to take high-voltage refresher training and thus lost his high-voltage qualification in 1982. Tr. 350-52; Gov't Ex. 16.

violation that is S&S. *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996); *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (Oct. 1994).

We next address the question of whether the violation was the result of unwarrantable failure. On this question, we would reverse the judge and remand for reassessment of the penalty, as the record compels the finding that the citation was the result of the operator's unwarrantable failure.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The record evidence in this case compels only one conclusion — that Black Mesa engaged in intentional misconduct. The operator deliberately refused to comply with the qualification standard after repeated warnings by MSHA. In fact, plant manager Andrew Mikesell testified that management "made a conscious decision that we were not going to pursue a high voltage qualification." Tr. 504. *See also* Tr. 583 (the decision not to comply was agreed to by management). Although it used an electrician who was high-voltage qualified to perform work that was necessary to abate citations, Black Mesa returned to using a low/medium-voltage qualified electrician on the ground that it would not accede to MSHA's interpretation of the regulations while it challenged that interpretation.[7] 20 FMSHRC at 669; Tr.127, 129-30, 507.

[7] We are fully aware that Black Mesa disagreed with the Secretary's interpretation of what constituted a "qualified person" as defined by the regulations. 20 FMSHRC at 668. In fact, after receiving the September citation, Black Mesa made clear that it intended to seek adjudication of the electrical qualifications issue. *Id.* at 669. Instead of doing so, however, it simply proceeded to continue to utilize unqualified individuals.

We recognize an operator's right to come to the Commission for a ruling about the proper interpretation of an MSHA standard. *See, e.g., Akzo Nobel Salt, Inc.*, 21 FMSHRC 846 (Aug. 1999), *vacated and remanded on other grounds*, No. 99-1370 (D.C. Cir. May 26, 2000). We also recognize that to obtain a Commission ruling, the operator must violate MSHA's view of the regulation so as to receive a citation the Commission can review. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). However, the mere fact that an operator is proceeding with a legal test case cannot insulate it from a finding of unwarrantable failure if the operator fails to proceed in good faith and in a reasonable manner. *See New Warwick Mining Co.*, 18 FMSHRC 1365 (Aug. 1996) (affirming unwarrantable failure determination when the operator asserted that it was attempting a good faith challenge of MSHA's interpretation of a regulation and wished to have

The judge based her finding of no unwarrantable failure on her view that Black Mesa held a reasonable belief that it was not violating the regulation. The judge relied on Black Mesa's argument that it was in compliance with the regulations as long as its electricians did not work on *energized* high-voltage equipment. 20 FMSHRC at 677.[8] In accepting Black Mesa's belief as reasonable, the judge apparently relied solely on evidence that previous MSHA inspectors had failed to cite Black Mesa when presented with its belief regarding the regulations. *See id*.[9] However, the judge failed to consider the fact that the unwarrantability allegation is contained in a citation that was issued only after Inspector's Saint's third visit to the prep plant. On each previous inspection he had explained to Black Mesa that he, as MSHA's representative, did not agree with Black Mesa's reading of the regulations, and that its electricians were performing work in violation of those regulations. *See* 20 FMSHRC at 668-69, 669-70. Moreover, on his first visit to the prep plant Saint confirmed with his supervisor that this was MSHA's view as well (*id*. at 668), and on his second visit Black Mesa was a party to a telephone conference with MSHA electrical supervisors in two different locations during which that point was reiterated. *Id*. at 669; Tr. 366-70. Consequently, this is not just a case of one MSHA inspector taking a different position than previous inspectors.

Black Mesa deliberately thwarted the clear instructions of MSHA officials regarding compliance with this standard. Its intentional refusal to comply with the regulatory requirements which had been painstakingly communicated by MSHA constitutes unwarrantable failure.

Finally, we address the penalty issue raised by Black Mesa. It asks the Commission to address the ALJ's finding that the Secretary, in increasing the penalty she assessed for the violation of section 77.502 from the initial $150 to $2,500, sought to punish the operator for seeking an interpretation at the Commission of section 77.103. BM Br. at 26-29; BM Reply Br. at 9-11.[10] Black Mesa maintains that review is called for because the issue "presents a substantial question of law, policy or discretion which should be addressed by the Commission[,]" and that the conduct of the Secretary "warrants more than a mere passing observation by the [ALJ]." BM Br. at 26, 29.

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the issue clarified by receiving a citation, but the operator's actions were not reasonable).

[8] While Black Mesa urged this interpretation of the regulations to the judge in its defense of the citation (*see* 20 FMSHRC at 674-75), it repeats the defense on appeal only to the extent it is relevant to the issue of unwarrantability.

[9] The judge states that her finding on the reasonableness of Black Mesa's belief is based "in part" on this evidence, but discusses no other evidence. *See* 20 FMSHRC at 667.

[10] The judge also noted that the $1,500 penalty the Secretary ultimately assessed for the section 77.103 citation the judge vacated was initially assessed at $50. 20 FMSHRC at 678.

While Black Mesa's first contention accurately states the grounds on which the Commission may grant review under Mine Act section 113(d)(2)(A)(ii) (*see* 30 U.S.C. § 823(d)(2)(A)(ii)), Mine Act section 113(d)(2)(A)(i) clearly specifies that petitions for review on such grounds may only be filed by a "person adversely affected or aggrieved by a decision of the [ALJ]." 30 U.S.C. § 823(d)(2)(A)(i). It is equally clear that the judge's finding to which Black Mesa refers worked to Black Mesa's benefit. The judge not only concluded that an operator's "[f]ailure to cooperate is not a valid basis to conclude that a violation is more hazardous or that its occurrence is attributable to a higher degree of negligence, warranting an elevation in penalty[,]" (20 FMSHRC at 678), but she also determined that a penalty of $400, not $2,500, was appropriate. *Id*.

Because Black Mesa does not contend that the judge should have reduced the penalty even further, we do not believe that, with respect to the penalty issue it raises, it can be considered "adversely affected or aggrieved" under the Mine Act. *See Asarco, Inc.*, 20 FMSHRC 1001 (Sept. 1998) (vacating grant of review of adverse determination requested by party that nevertheless prevailed below), *aff'd*, 206 F.3d 720 (6th Cir. 2000).[11]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

[11] In one respect Black Mesa's grounds for review are even weaker than the case presented by the petition for review in *Asarco*, because below Black Mesa was the prevailing party on the issue on which it seeks review.

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